Supreme Court, U.S.
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No. 96-1318

In The

Supreme Court of the United States

October Term, 1996

OCALA STAR-BANNER CORPORATION AND
THE NEW YORK TIMES COMPANY,

Petitioners,

vs.

BERNARD F. McNELY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners seek certiorari appeal by asserting a purported conflict among the Circuits and the existence of an important question of law pertaining to the Americans With Disabilities Act ("ADA") in this cause. In fact, neither criteria is satisfied. Rather, the decision of the Eleventh Circuit Court of Appeals below regarding the *prima facie* elements for satisfying a claimant's burden of proof under the ADA involves no articulated conflict among the Circuits and fails to constitute an important question for this Court. Had any other Circuit Court undertaken to analyze and articulate the liability standard for prevailing under the terms of the ADA, a conflict would arguably exist. Had the Eleventh Circuit opted to insert the restrictive term "solely" regarding the liability standard as advocated by Petitioners contrary to the expressed intent of Congress, then an important question of law would arguably exist. Instead, the Eleventh Circuit below merely analyzed and articulated the liability standard applicable to the Americans With Disabilities Act consistent with the language of the statute and the intent of Congress. Therefore, certiorari appeal is unwarranted.

As set forth in the opinion of the Eleventh Circuit below (Petition, App. A), Title I of the ADA, which applies to the private sector, provides for the elimination of disability-based discrimination as follows:

> No covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual . . .

42 U.S.C.A. §12112(a) (emphasis added). Title II of the ADA, which applies to public sector employment, likewise contains the parallel provision that states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of* such disability, . . .

Id. §12132 (emphasis added).

Furthermore, the ADA seeks to eliminate retaliation by private employers against employees who assert their statutory rights against disability-based discrimination as follows:

> No person shall discriminate against any individual *because* such individual has opposed any act or practice made unlawful by this chapter . . .

Id. §12203(a) (emphasis added).

None of the foregoing provisions contain the word "solely" or any other similar restrictive term. As with any other statute, an appropriate analysis of the ADA must begin with the plain language of the statute itself. *See Shaw v. Delta Airlines*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L. Ed. 2d 490 (1983). As referenced in the Petition and by the Eleventh Circuit Court of Appeals below, the legislative history of the House Committee Report explained the decision to leave "solely" out of Title II as follows:

> The Committee recognizes that the phrasing of §202 in this legislation differs from §504 [of the Rehabilitation Act] by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. The deletion of this phrase is supported by the experience of the executive

> agencies charged with implementing §504 . . . A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results . . .

H.R. Rep. No. 485 (II), 101st Cong., 2nd Sess., at 85 (1990). The Senate Committee Report contains a virtually identical passage. *See*, S. Rep. No. 116, 101st Cong., 1st Sess., at 44-45 (1989).

Contrary to the plain language of this statute, the Petitioners request that this Court insert, *judicially*, a critical restrictive term that was expressly deleted, *legislatively*. If the Eleventh Circuit Court of Appeals upon its careful analysis had agreed to jettison the plain language of the statute and its legislative history and insert judicially the restrictive term "solely" to the liability standard applicable to the ADA, then perhaps an "important question" would be ripe for review by this Court. However, because the Eleventh Circuit merely interpreted the ADA consistent with its plain language and legislative history no significant or important question arises from its ruling in favor of Respondent below.

Similarly, Petitioners contend that the Eleventh Circuit's ruling below creates a conflict within the circuits, but can cite to no other circuit that has analyzed and articulated the liability standard applicable to a claim of discrimination under the ADA. In fact, the cases cited by Petitioners either reference the term "solely" in dicta without comment or application to the issues on appeal, or acknowledge the language of the ADA that expressly authorizes a departure from the Rehabilitation Act within the framework of the ADA. Notably, §12201 (a) states:

> *Except as otherwise provided in this chapter,* nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such Title.

42 U.S.C. §12201(a) (emphasis added). *See also, Vande Zande v. State of Wisconsin, Department of Administration,* 44 F.3d 538, 541 (7th Cir. 1995) (Rehabilitation Act can be consulted for clues to the meaning of the "same terms" in the new ADA law); *Myers v. Hose,* 50 F.3d 278, 281 (4th Cir. 1995) (noting that the ADA codified "much of" the case law and the implementing regulations of the Rehabilitation Act); *Monette v. Electronic Data Systems Corporation,* 90 F.3d 1173 (5th Cir. 1996) (analysis of claims under the ADA "roughly parallels" those brought under the Rehabilitation Act); *compare, House of Representatives Committee Report,* H.R. Rep. 101-485, Pt. 3, 101st Cong., 2d Sess., at 32 (1990) (the ADA borrows "much of its substantive framework" from §504 of the Rehabilitation Act of 1973).

As noted by the Eleventh Circuit, none of the Circuit Court cases referenced by Petitioners constitute a *bona fide* conflict among the circuits with respect to the liability standard applicable to the ADA. In fact, only one of the five decisions cited by the Petitioners below actually held that "because of" in the ADA context means "solely because of". However, the case of *Despears v. Milwaukee County,* 63 F.3d 635 (7th Cir. 1995), did not present any extended discussion or analysis in support of its cursory application of the "solely" standard applicable to the ADA liability standard. The absence of any articulated

analysis or express ruling regarding the applicable standard indicates that *Despears* fails to constitute a "real" or "embarrassing" conflict of opinion and authority between courts of appeal. *See, Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S.Ct. 614, 99 L. Ed. 897 (1955). As such, until a Circuit Court judicially alters the standard of liability under the ADA by expressly *adding and applying* the term "solely" into the ADA framework, no "important question" exists sufficient to warrant appeal to this Court. Similarly, until such time as a Circuit Court conflicts expressly with the Eleventh Circuit's careful analysis of the plain language and legislative history of the ADA regarding this issue, no conflict exists sufficient to warrant an appeal to this Court.

CONCLUSION

The Eleventh Circuit Court of Appeals' decision in this case has failed to create a justiciable conflict among the Circuits or an important question of law warranting resolution by this Court and the Petition should be denied accordingly.

Respectfully submitted,

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